IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-420

CAESAR'S HEALTH CLUB, et al.,
Petitioners,

v.

ST. LOUIS COUNTY, MISSOURI.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals, St. Louis District

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Caesar's Health Club, et al., your petitioners, respectfully pray that a writ of certiorari be issued to review the judgment of the Missouri Court of Appeals, St. Louis District, entered in the above-entitled cause on the 21st day of June, 1978.

OPINIONS BELOW

On August 19, 1975, petitioners, twelve corporations or proprietorships conducting business in St. Louis County, Missouri, as massage parlors, filed a petition in the Circuit Court of St. Louis County, Missouri, for declaratory judgment and

for interlocutory and permanent injunctive relief against the application and enforcement of St. Louis County Ordinance No. 7546. The ordinance defines prostitution and prescribes criminal penalties therefor. On July 23, 1976, the Circuit Court declared St. Louis County Ordinance No. 7546 to be constitutional, lawful and valid. A copy of the ordinance is reproduced in Appendix A.

Petitioners duly appealed to the Missouri Court of Appeals, St. Louis District. In an opinion filed April 11, 1978, the judgment of the trial court was affirmed. The opinion of the Missouri Court of Appeals, St. Louis District, has been officially reported and can be found at 565 S.W.2d 783 (1978). A copy of the opinion is reproduced in Appendix B.

Various motions for rehearing and transfer were filed and overruled by the Missouri Court of Appeals, St. Louis District. Thereafter, petitioners duly filed an application for transfer to the Supreme Court of Missouri. On June 15, 1978, the Supreme Court of Missouri denied petitioners' application to transfer the cause from the Missouri Court of Appeals, St. Louis District, to the Supreme Court of Missouri. A copy of the order of the Supreme Court of Missouri denying petitioners' application for transfer is reproduced in Appendix C.

On June 21, 1978, the mandate of the Missouri Court of Appeals, St. Louis District, was received and entered into the record of St. Louis County, Missouri. By an order of that Court dated June 29, 1978, a temporary restraining order previously entered was continued in full force and effect pending application to the United States Supreme Court for a Writ of Certiorari. Enforcement of St. Louis County Ordinance No. 7546 is thereby stayed pending a determination by this Honorable Court of this petition for a writ of certiorari.

JURISDICTION

The opinion of the Missouri Court of Appeals, St. Louis District, was filed on April 11, 1978. The Supreme Court of Missouri denied discretionary transfer on June 15, 1978.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I

Whether the trial court's failure to require, and the respondent's failure to show a compelling state interest to justify the challenged ordinance deprives petitioners of rights guaranteed them under the Constitution of the United States.

II

Whether the challenged ordinance violates fundamental rights of privacy afforded petitioners by the Constitution of the United States.

III

Whether the challenged ordinance violates petitioners' rights to Due Process of Law as guaranteed by the Constitution of the United States by reason of its overbreadth.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Amendments to Constitution of the United States:

I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes of State of Missouri

§ 563.230. **The abominable and detestable crime against nature—penalty**

Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years.

Ordinances of St. Louis County, Missouri

Bill No. 178, Ordinance No. 7546

Section 1. Sections 713.030, 713.040, 713.050 and 713.080 SLCRO 1964, as amended, are hereby repealed.

Section 2. Title VII, Chapter 713, SLCRO 1964, as amended, the Vice and Morality Code, is hereby amended by enacting and adding thereto three new sections, to be numbered 713.-030, 713.040 and 713.080, relating to the regulation of prostitution, which new sections shall read as follows:

713.030 **Definitions** 1. The term "person" as used in this Chapter shall mean any natural person, firm, partnership,

co-partnership, association, corporation or organization of any kind.

2. A person commits "prostitution" if he or she engages or offers or agrees to engage in sexual conduct in return for something of value to be received by the person or a third person.

3. "Sexual Conduct" occurs when there is:

(a) "Sexual Intercourse" which occurs when there is any penetration of the female sex organ by the male sex organ;

(b) "Deviate Sexual Intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person;

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another.

4. "Something of Value" means any money or property, or any token, object or article exchangeable for money or property.

5. "Promoting prostitution" occurs when a person knowingly promotes, solicits, compels, or encourages a person to engage in prostitution or patronize prostitution.

6. "Profiteering from Prostitution" occurs when a person, acting other than as a prostitute receiving compensation for personally rendered prostitution services, knowingly accepts money or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.

713.040 **Prostitution, Promoting Prostitution, Profiting from Prostitution—Prohibited.**—A person shall not engage in prostitution, promoting prostitution, or profiting from prostitution.

713.080 **Penalties**—Any person violating any of the provisions of this Chapter shall upon conviction be punished by a fine not exceeding One Thousand Dollars ($1,000.00) or by imprisonment in the County Jail for not exceeding one (1) year, or by both such fine and imprisonment.

STATEMENT

On August 19, 1975, petitioners, being twelve corporations or proprietorships, all duly authorized and conducting business in St. Louis County, Missouri, filed a petition for declaratory judgment and for interlocutory and permanent injunctive relief against the application and enforcement of St. Louis County Ordinance No. 7546.

All petitioners conduct the business of a massage parlor, involving on occasion the touching, manually or otherwise, by employees of petitioners of the anus or genitals of another in exchange for something of value.

A Temporary Restraining Order and an Order to Show Cause were issued by the Honorable George W. Cloyd, Judge, Division Nine of the St. Louis County Circuit Court on August 19, 1975, and the latter was made returnable on October 14, 1975. On July 23, 1976, the challenged Ordinance was declared "to be constitutional, lawful and valid", the "(t)emporary restraining order dissolved" and the "(p)ermanent injunction denied". On July 26, 1976, the Honorable William H. Crandall, Jr., Judge, Division One of the St. Louis County Circuit Court, "in the absence of and at the request of Judge George W. Cloyd" granted further injunctive relief against the application and enforcement of the challenged legislation pending appeal.

Petitioners' motion for new trial was filed on August 6, 1976, and the same was overruled on September 24, 1976. Notice of Appeal and Jurisdictional Statement were duly filed by petitioners on October 1, 1976.

Petitioners duly appealed to the Missouri Court of Appeals, St. Louis District. In an opinion filed April 11, 1978, the judgment of the trial court was affirmed.

Various motions for rehearing and transfer were filed and overruled by the Missouri Court of Appeals, St. Louis District. Thereafter petitioners duly filed an application for transfer to the Supreme Court of Missouri. On June 15, 1978, the Supreme Court of Missouri denied petitioners' application to transfer the cause from the Missouri Court of Appeals, St. Louis District, to the Supreme Court of Missouri.

On June 21, 1978, the mandate of the Missouri Court of Appeals, St. Louis District, was received and entered into the record of St. Louis County, Missouri. By an order of that Court dated June 29, 1978, a temporary restraining order previously entered was continued in full force and effect pending application to the United States Supreme Court for a Writ of Certiorari. Enforcement of St. Louis County Ordinance No. 7546 is thereby stayed pending a determination by this Honorable Court of this petition for a writ of certiorari.

RAISING OF THE FEDERAL QUESTIONS

This litigation commenced upon the filing by petitioners of a petition in the Circuit Court of St. Louis County, Missouri, for a declaratory judgment, interlocutory and permanent injunctive relief. In that petition, petitioners raised various federal constitutional questions under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. The judgment of the trial court was a declaration that St. Louis County Ordinance No. 7546 is constitutional, lawful and valid.

On appeal, petitioners re-raised and preserved the numerous federal constitutional questions in their briefs and arguments before the Missouri Court of Appeals, St. Louis District. The arguments relating to federal constitutional questions were rejected by that court as shown in the following excerpts from the court's opinion:

> "Appellants argue the trial court erred in declaring the ordinance constitutional because respondent failed to meet its burden of demonstrating a compelling state interest as justification for the ordinance."
>
> * * * * * * * *
>
> "They assert that enforcement of the ordinance would infringe upon the constitutionally guaranteed right of privacy insofar as it would proscribe private sexual conduct between consenting adults."
>
> * * * * * * * *
>
> "Appellants urge that implicit in the concept of ordered liberty is the fundamental privacy right of its employees and patrons to participate in sexual massage activities in the seclusion afforded by appellants' massage establishments."
>
> * * * * * * * *
>
> "Appellants further contend the ordinance is unconstitutionally overbroad, and therefore void and unenforceable."

In addition there were numerous other references throughout the Court's opinion indicative of the raising and rejecting of federal constitutional questions. The same questions were raised in the various motions for rehearing and applications for transfer subsequent to the filing of the opinion by the Missouri Court of Appeals, St. Louis District.

REASONS FOR GRANTING THE WRIT

I

Compelling State Interests

This litigation commenced upon the filing by petitioners of a petition in the Circuit Court of St. Louis County, Missouri, for a declaratory judgment, interlocutory and permanent injunctive relief. Respondent neither filed an answer to petitioners' petition nor in any other manner asserted or suggested a legitimate state interest in the conduct sought to be prohibited. The granting by the trial court of what must be termed a "summary judgment" procedurally precluded respondent from asserting any legal basis of a compelling state interest nature in justification of the ordinance. Respondent had neither prayed nor moved for such relief and the premature judgment of the trial court foreclosed respondent from establishing any legal basis sufficient to sustain the trial court's finding that the ordinance was constitutional, lawful and valid.

The United States Supreme Court has clearly recognized that the burden of justifying the type of legislation herein challenged, which infringes upon fundamental sexual rights, lies heavily upon the respondent.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' "[1]

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[1] *Roe*, et al. v. *Wade*, etc., 410 U.S. 113, 155 (1973). See: *Paris Adult Theatre I*, et al. v. *Slayton*, etc., et al., 413 U.S. 49, 65 (1973); and *Memorial Hospital*, et al. v. *Maricopa County*, et al., 415 U.S. 250, 254 (1974).

This principle is particularly applicable when "one's beliefs, ideas, politics, religion, cultural concerns, and the like"[2] become involved; a situation present at bar.[3]

> "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[4]

While this axiom of the heavy burden upon the respondent to justify legislative interference with the fundamental right to private sexual conduct is capable of being succinctly stated, its importance should not be overshadowed by either its brevity or clarity. Respondent, the County of St. Louis, has failed to assert, demonstrate and/or to prove any state interests which even approach the level of interests intrinsic to individual privacy within the realm of sexual expression, much less any state interests of a "compelling" magnitude or nature.

The applicability of the "compelling state interest" standard to the factual circumstances here has been widely recognized in numerous cases deciding the constitutionality of state statutes attempting to regulate private sexual conduct.[5]

Petitioners respectfully submit that this Honorable Court can compare the total denial of due process by the trial court in these proceedings by reason of the complete absence of an evi-

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[2] *California Bankers Assn.* v. *Schultz*, etc., et al., 416 U.S. 21, 86 (1974).

[3] See: Gelinas, Roe v. Wade *and* Doe v. Bolton: *The Compelling State Interest Test in Substantive Due Process,*" 30 WASH. & LEE L.REV. 628 (1973).

[4] *O'Connor* v. *Donaldson*, 422 U.S. 563, 575 (1975).

[5] *State of Iowa* v. *Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976); *The People of the State of New York* v. *Rice*, et al., 80 Misc. 2d 511, 515 (1975), 363 N.Y.S.2d 484, 488. See: *Broadrick*, et al. v. *Oklahoma*, et al., 413 U.S. 601, 611-612 (1973).

dentiary hearing or opportunity for same with the denial of due process found by this Court in the termination of utility services.[6]

That the failure to afford petitioners an evidentiary hearing denied them their constitutional rights cannot be disputed. Surely it was the lack of a record that led to the mischaracterization by the Missouri Court of Appeals, St. Louis District, of the challenged ordinance as being civil rather than criminal in nature.[7] So too, the lack of an evidentiary basis for findings of fact must have contributed to that Court's categorization of petitioners' activities as occurring in "places of public accommodation" as opposed to "private places". The record in this case is absolutely silent as to the location, circumstances and conditions under which massages are administered by petitioners. Again, no factual record was made nor trial held. There is no reason to believe from the basis of the record that massages are not, in fact, given in the customer's home or another locale affording total privacy. There was and is no legal justification for the Missouri Court of Appeals, St. Louis District's, comparison of petitioners' activities to the total lack of privacy prevailing in a public movie house such as this involved in *Paris Adult Theatre I, et al. v. Slayton, etc., et al.*, 413 U.S. 49 (1973), and reliance upon that decision on that issue is misplaced.

II

Privacy

Although privacy is not a concept protected by the Constitution *per se*, it is a concept long recognized as fundamental to the rights, privileges and immunities guaranteed citizens of the

[6] *Memphis Light, Gas and Water Division*, et al. v. *Craft*, et al., — U.S. —, 46 L.W. 4398 (May 1978).

[7] See the Court's Opinion, Appendix B.

United States. As early as 1891, this Court, in *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1891), recognized that:

> "No right is held more sacred, or is more carefuliy guarded . . . than the right of every individual to the possession and control of his own person . . . 'The right to one's person may be said to be a right of complete immunity: to be let alone.' " 141 U.S. at 251.

The right of privacy has in a variety of contexts been held to be implicit in a multitude of constitutional settings. Among others, it has been established within the First Amendment freedom of association,[8] within the First Amendment freedom of speech,[9] within the Fourth Amendment restraint on search and seizure,[10] within the Ninth Amendment's unenumerated rights,[11] within the Fourteenth Amendment equal protection guarantee,[12] within the Fourteenth Amendment due process guarantee[13] and within the penumbra of the Bill of Rights.[14] It unquestionably also inately resides within the First Amendment freedom of religion and within the Fifth Amendment restraint on self-incrimination.

The antecedents and progeny of *Griswold, et al. v. Connecticut*, 381 U.S. 479 (1965), offer generalized support for apply-

[8] *National Association for the Advancement of Colored People* v. *Alabama* ex rel. *Patterson*, etc., 357 U.S. 449 (1958).

[9] *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[10] *Terry* v. *Ohio*, 392 U.S. 1 (1968).

[11] *Griswold*, et al v. *Connecticut*, 381 U.S. 479 (1965), *Goldberg, J., concurring.*

[12] *Loving*, et ux. v. *Virginia*, 388 U.S. 1 (1967).

[13] *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973).

[14] *Griswold, supra, Golberg, J., concurring.*

ing a presumptive constitutional right of privacy to sexual relations and conduct.

Griswold, supra, is not an isolated decision confined to its facts, but is one in a continuing line of decisions involving various aspects of personal privacy and family autonomy.[15]

When the decisions are examined, they plainly support a "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia,* 394 U.S. 557, 564 (1969). Indeed, *Stanley, supra,* is of special importance, for there a majority of the Court embraced with approval the very significant language from Mr. Justice Brandeis' dissent in *Olmstead,* et al. *v. United States,* 277 U.S. 438 (1928).

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

[15] Commentary on the *Griswold* case has been extensive. Particularly noteworthy materials include: Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 SUP. CT. REV. 119; Gross, *The Concept of Privacy,* 42 N.Y.U.L. REV. 34 (1967); Pilpel, *Birth Control and a New Birth of Freedom,* 27 OHIO ST. L.J. 679 (1966); Franklin, *The Ninth Amendment,* etc., 40 TUL. L. REV. 487 (1966); Beaney, *The Griswold Case and the Expanding Right to Privacy,* 1966 WIS. L. REV. 979; *Symposium—Comments on the Griswold Case,* 64 MICH. L. REV. 197 (1965); Note, *The Uncertain Renaissance of the Ninth Amendment,* 33 U. CHI. L. REV. 814 (1966); Note, 60 Nw. U.L. REV. 813 (1966); Note, *The Supreme Court—1964 Term,* 79 HARV. L. REV. 56, 162-65 (1965).

The right of sexual privacy has been extended into the areas of contraception for both married[16] and single[17] persons, abortion,[18] acts with non-spousal partners,[19] acts of oral-sexual expression between heterosexuals[20] and the right to possess privately obscene material.[21]

The singular issue in this cause is the constitutional challenge to the statutory prohibition defining as criminal,

> " 'Sexual conduct' which occurs where there is:
>
> . . .
>
> (c) 'Sexual contact' which means any touching, manual or otherwise, of the anus or genitals of one person by another.
>
> "4. 'Something of Value' means any money or property, or any token, object or article exchangeable for money or property." (St. Louis Co. Ord. No. 713.030).

The challenged section, if strictly construed, gives no consideration to the individual's particular desires, needs or circumstances. It impinges severely upon the individual's dignity. It is a first order invasion of privacy.

It must be emphasized that the opinion of the Missouri Court of Appeals, St. Louis District, rejected petitioners' arguments

[16] *Griswold,* et al. v. *Connecticut,* 381 U.S. 479 (1965).

[17] *Eisenstadt,* etc. v. *Baird,* 405 U.S. 438 (1972).

[18] *Roe,* et al. v. *Wade,* etc., 410 U.S. 113 (1973); *Doe,* et al. v. *Bolton,* etc., et al., 410 U.S. 179 (1973); *Planned Parenthood of Central Missouri,* etc., et al. v. *Danforth,* etc., et al., — U.S. — (1976).

[19] *Fadgen* v. *Lenkner,* — Pa. — (1976), 365 A.2d 147; *Wyman* v. *Wallace,* 15 Wash.App. 395 (1976), 549 P.2d 71.

[20] *Lovisi,* et al. v. *Slayton,* etc., et al., 539 F.2d 349 (4th Cir. 1976).

[21] *Stanley* v. *Georgia,* 394 U.S. 557 (1969).

relating to privacy because of their commercial aspect. That Court's reliance upon *Brown, et al. v. Haner, et al.*, 410 F.Supp. 399 (W.D.Va. 1976), for the proposition that rights of privacy lose their constitutional protection when asserted in a commercial context is unwarranted. Such *dicta* by the District Court in *Brown, supra*, is without legal support and contrary to a host of decisions by this Honorable Court.[22]

The opinion of the Missouri Court of Appeals, St. Louis District, cited *Roe et al. v. Wade, etc.*, 410 U.S. 113 (1973), in recognition of the right of privacy but ignored the fact that the same rights of privacy in the abortion context have been recognized in the commercial sphere both as to abortion providers,[23] and as to abortion advertisers.[24] Similarly, this Honorable Court has recognized the rights of privacy relating to contraception as having the full panoply of constitutional protections although asserted in the commercial context by vendors of the products.[25]

It is clear that the fundamental right of sexual privacy extends to sexual acts between heterosexuals performed in private. A recent line of appellate cases confirms these principles and discards the anachronistic and historical basis for regulating such conduct. This trend has been mandated by a line of decisions by the United States Supreme Court, set forth, *supra*.

While no reported cases exist reviewing statutes attempting merely to prohibit heterosexual non-sodomitical touching (such

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[22] *First National Bank of Boston*, et al. v. *Bellotti*, etc., et al., — U.S. —, 46 L.W. 4371 (April 26, 1978); *Bates*, et al. v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc.*, et al. v. *Township of Willingboro*, et al., 431 U.S. 85 (1977); *Virginia State Board of Pharmacy*, et al. v. *Virginia Citizens Consumer Council, Inc.*, et al., 425 U.S. 748 (1976).

[23] *Singleton*, etc. v. *Wulff*, et al., 428 U.S. 106 (1976).

[24] *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975).

[25] *Carey*, etc., et al. v. *Population Services International*, et al., 431 U.S. 678 (1977).

as regulated here), a wealth of cases voiding regulation of oral-genital or anal-genital contact are available for guidance. Manifestly, the touching conduct regulated here is significantly less offensive and substantially less capable of appropriate regulation through the exercise of police power, than the sodomitical conduct reviewed by other courts. While it might reasonably be suggested that acts of sodomy are offensive to the community-at-large, it can hardly be contended that the same is true of mere touching, which is presupposed by any act of sexual intercourse.

This is confirmed by the existence of a state-wide regulation of sodomitical acts, consisting of "the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth," by a felony statute (R.S.Mo. § 563.230) and the total absence of other sexual touching regulation by the state. Correspondingly, the constitutional standards by which prohibitions on sexual touching (other than acts of sodomy) are to be adjudged should be more strictly construed than the same standards when applied to acts of sodomy.

As most recently stated by the Supreme Court of Iowa, in voiding as unconstitutional the state's sodomy statute,

> ". . . section 705.1 in its present form is unconstitutional as an invasion of fundamental rights, such as the personal right of privacy, to the extent it attempts to regulate through use of criminal penalty consensual sodomitical practices performed in private by adult persons of the opposite sex." *State of Iowa v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976).

Similarly, other state appellate courts in Massachusetts, New Jersey and New York have, in recent years, reached identical conclusions as to their respective sodomy statutes.

". . . a new factor has appeared with the articulation of the constitutional right of an individual to be free from government regulation of certain sex-related activities.

. . .

"In light of these changes and in light of our own awareness that community values on the subject of permissible sexual conduct no longer are as monolithic as the *Jaquith* case suggested they were in 1954, we conclude that § 35 must be construed to be inapplicable to private, consensual conduct of adults." *Commonwealth v. Balthazar*, 366 Mass. —, — (1974), 318 N.E.2d 478, 480-481.

"We agree and now hold that our statute does not include within its prohibition the conduct of married couples." *State of New Jersey v. Lair*, 62 N.J. 388, 396 (1973), 301 A.2d 748, 753.

Two New York decisions[26] have struck down the state's sodomy law on equal protection grounds for discriminating between married and unmarried persons. Both decisions clearly indicate the unconstitutionality of statutes regulating heterosexual conduct between consenting adults.

In addition, courts in Pennsylvania[27] and Washington[28] have recently struck down causes of action regulating sexual intercourse outside of marriage, through alienation of affection and criminal conversation claims. As observed earlier, sexual intercourse, *per se*, presupposes the touching of another's genitals in the very manner prohibited by the legislation, herein challenged.

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[26] *The People of the State of New York* v. *Johnson*, 77 Misc.2d 889, 891 (1974), 355 N.Y.S.2d 266, 267-268; *The People of the State of New York* v. *Rice*, et al., 80 Misc.2d 511, 515-517 (1975), 363 N.Y.S.2d 484, 487-488.

[27] *Eadgen* v. *Lenkner*, — Pa. — (1976), 365 A.2d 147.

[28] *Wyman* v. *Wallace*, 15 Wash.App. 395 (1976), 549 P.2d 71.

The federal courts have reached identical conclusions. In *Cotner v. Henry*, etc., 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968), the Seventh Circuit interpreting the Indiana sodomy statute held that,

". . . Indiana courts could not interpret the statute constitutionally as making private consensual physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations, which outweighed the constitutional right to marital privacy." 394 F.2d at 875.

In *Buchanan*, et al. v. *Batchelor*, etc., et al., 308 F.Supp. 729 (N.D.Tex. 1970), *vacated and remanded on other grounds*, 401 U.S. 989 (1971), an unanimous three-judge federal panel voided the state's sodomy statute and held that,

"Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct. Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation." 308 F.Supp. at 733.

In *Lovisi*, et al. v. *Slayton*, etc., et al., 363 F.Supp. 620 (E.D.Va. 1973), *affirmed*, 539 F.2d 349 (4th Cir. 1976), the federal court, although upholding the state court conviction of the defendant because the act charged had been conducted publicly and not privately, observed that,

"The Court concludes that the rationale expressed in *Eisenstadt* extends to protect the manner of sexual relations between unmarried persons. It is not marriage vows which makes intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of

sexuality itself or something intensely private to the individual that calls forth constitutional protection. While the condition of marriage would doubtless make more difficult an attempt by government to justify an intrusion upon sexual behavior, this condition is not a prerequisite to the operation of the right of privacy." 363 F.Supp. at 625.

Lastly, in *The United States v. Brewer*, 363 F.Supp. 606, (M.D.Pa. 1973), *affirmed*, 491 F.2d 751 (3rd Cir. 1973), the federal court, while upholding the prohibition against sodomy within state prisons, noted,

> "While there has been no Supreme Court decision on the precise issue of the constitutional validity of statutes aimed at preventing 'deviant sexual conduct,' the apparent trend of recent decisions would indicate that such a right among or between consenting adults does exist." 363 F.Supp. at 607.

The applicability of the foregoing discussion of sexual privacy in the context of sodomitical acts approaches argumentive overkill to the issue at hand. Sodomy is always considered as deviant, undesired or disapproved sexual behavior. The issue here is merely touching, not sodomy. It must be borne in mind that petitioners do not challenge in this cause § 713.030(3)(b) prohibiting "any sexual act involving the genitals of one person and the mouth, tongue or anus of another person". Petitioners challenge only § 713.030(3)(c) prohibiting "any touching, manual or otherwise, of the anus or genitals of one person by another". It is extremely difficult to conceive of any consequential sexual act, whether terminating in intercourse or not, which does not imply or involve the touching of another's genitals. The prohibition includes all sexual foreplay or "petting", regardless of whether it culminated in sexual intercourse.

Any doubt as to the correctness of prior courts' holdings in this area is dissipated by the extreme measure of regulation imposed in this cause, when compared to the attempts to regulate specific, identifiable acts of sodomy in analogous cases.

A second and collateral, although independent element of privacy, is invaded by the challenged section. The privacy of the home is threatened here. The scope of the section herein challenged easily extends to the privacy of the home and the ordinance contains no self-limiting features as to where, much less as to whom, why and when, discussed, *infra*.

The inviolate privacy of the home has been recognized by the Supreme Court in relation to the possession of obscene material,[29] and by the Alaska Supreme Court in relation to marijuana use.[30] As so aptly noted by Justice Harlan, dissenting in *Poe, et al. v. Ullman*, etc., 367 U.S. 497, 548 (1961);

> "This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty', the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny'."

A majority of the United States Supreme Court agreed in *United States v. Orito*, 413 U.S. 139, 142 (1973), when it held that, "(t)he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of . . . procreation. . . ."

The protection of various rights in the marital family context has firm origins in decisions dating back over fifty years. A first and recent example, *Loving*, et ux. v. *Virginia*, 388 U.S. 1, 12

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[29] *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[30] *Ravin* v. *State of Alaska*, 537 P.2d 494 (Alaska 1975).

(1967), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving, supra,* stands for the proposition that "the right to marry" is protected by the due process clause, although not specifically mentioned in the Bill of Rights. Petitioners contends that *Loving, supra,* lends further support to the conclusion that other important interests associated with sexual conduct are protected from arbitrary, governmental intrusion.

Associated with the right to marry is the right to rear children, if one chooses, without arbitrary, state interference. An unanimous Supreme Court has held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crimes, but not of others similarly situated. *Skinner v. Oklahoma* ex rel. *Williamson,* etc., 316 U.S. 535, 536 (1942). Again, the right to have offspring is not specified in the Bill of Rights. However, the Supreme Court in *Skinner, supra,* composed of Justices Douglas (author of the opinion), Black, Reed, Frankfurter, Murphy, Byrnes, Roberts, Jackson, and Chief Justice Stone (the latter two wrote concurring opinions), had no difficulty holding that this right was protected by the Constitution. Moreover, these members of the Supreme Court had all disassociated themselves from the economic, substantive, due process school of thought found in the much criticized and overruled opinion of *Lochner v. New York,* 198 U.S. 45 (1905).

Further cases upholding rights associated with the family include *Pierce,* etc., et al. *v. Society of Sisters,* 268 U.S. 510 (1925), and *Meyer v. State of Nebraska,* 262 U.S. 390 (1923), both of which were subsequently reaffirmed in *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), and *Griswold,* et al. *v. Connecticut,* 381 U.S. 479, 483 (1965). An unanimous Court

in *Pierce, supra,* recognized a right to send one's children to private school. This right was derived from "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-535. The Supreme Court in *Pierce, supra,* moreover, included Justices who rejected the economic, due process formula of *Lochner, supra,* namely Justices Brandeis, Holmes, and Stone.

Not dissimilar to *Pierce, supra,* was *Meyer, supra,* a 7-2 decision invalidating a state statute which prohibited the teaching of German to pupils below the eighth grade. The Supreme Court in *Meyer, supra,* found that the due process clause included "the right . . . to marry, establish a home and bring up children." 262 U.S. at 399. Again, the decision is not objectionable as a manifestation of economic due process, because it was joined by Justice Brandeis, among others, who rejected the *Lochner, supra,* scheme. The dissents, moreover, by Justices Holmes and Sutherland, rested on the assumption that the state had a substantial interest in assuring that foreign-born students and students of alien parentage had considerable training in the English language, before being exposed to other languages.[31] Not to be ignored are the companion abortion cases decided in 1973, dealing with the fundamental right of privacy as to the physical control of a woman's body in the termination of pregnancy. *Roe, supra,* 410 U.S. 113 (1973) and *Doe,* et al. *v. Bolton,* etc., et al., 410 U.S. 179 (1973).

Taken together, the *Griswold, Stanley, Loving, Skinner, Pierce, Meyer, Roe* and *Doe* decisions, *supra,* all illustrate that

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[31] See: *Poe,* et al. v. *Ullman,* etc., 367 U.S. 497, 551-552 (1961) (*Harlan, J., dissenting*),

> "[T]he integrity of . . . [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

the Constitution protects certain privacy, sexual and family interests from government intrusion, unless a substantial and compelling justification exists and is proven for such legislation. Such is and was not the case at bar.

III

Overbreadth

When rights of sexual privacy are statutorily invaded in a manner that may be justified by a compelling state interest, it is, nevertheless, required that such "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe*, et al. *v. Wade*, etc., 410 U.S. 113, 155 (1973).[32]

Here, the challenged section sweeps unnecessarily broad. Facially, it prohibits all touching of another's genitals or anus "in return for something of value." Within its scope included and subject to criminal sanctions are general medical practice and the recognized specialties of obstetrics, gynecology, urology and proctology. It unduly restricts the services of nurses and hospital orderlies in the handling of patients. Within its expansive scope is included barter arrangements between spouses in return for sexual participation. It literally prohibits the changing of a diaper for or the bathing of an infant by a compensated babysitter. It is not restricted by touching for sexual gratification nor to touching for sexual climax.

The gross and inexcusable overbreadth of this section and its total failure to eliminate the misperceived evil intended are direct results of the constitutional impermissibility of what was intended. Respondent has made illegal, for an endless variety of legitimate, health and normal sexual purposes, the accepted

[32] See: *California Bankers Assn. v. Schultz*, etc., et al., 416 U.S. 21, 85-86 (1974), *Douglas, J., dissenting.*

practice of touching the genitals or anus of another on a basis less than purely *gratis*.

The statute fails to exclude named persons from its language and, in fact, permits no exclusions of any kind from the mandate of its specific terms. Any attempt to exclude married persons would not save this section from its glaring unconstitutionality, for as the United States Supreme Court has noted,

> "If the right of privacy means anything, it is the right of the **individual,** married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person . . ." *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438, 453 (1972).

This distinction has repeatedly been recognized by cases striking down legislation which attempted to regulate sexual conduct in an overbroad fashion.[33]

While it may well be that the intent behind the adoption of this section was to regulate massage parlors (a fact not in evidence before the Trial Court); it is the very obtuseness of its drafting in an effort to avoid revealing its real intent that has produced its fatal constitutional flaw. Inclusion into the section of some reference to massage or to its purpose would have perhaps resulted in a legislative enactment "narrowly drawn to express only the legitimate state interests at stake." *Roe, supra*, 410 U.S. at 155. This, respondent choose not to do, and can not accomplish the same here by the power of suggestion.

Further the challenged section makes an erroneous irrebuttable presumption that all "touching, manual or otherwise,

[33] See: *State of Iowa* v. *Pilcher*, 242 N.W. 2d 348, 358 (Iowa 1976); *Buchanan*, et al. v. *Batchelor*, etc., et al., 308 F.Supp. 729, 735 (N.D. Tex. 1970), *vacated and remanded on other grounds*, 401 U.S. 989 (1971); *The People of the State of New York* v. *Johnson*, 77 Misc.2d 889, 891 (1974), 355 N.Y.S.2d 266, 267; and *The People of the State of New York* v. *Rice*, et al., 80 Misc.2d 511, 515 (1975), 363 N.Y.S.2d 484, 489.

of the anus or genitals of one person by another", in return for something of value", is against public morality and in need of prohibition. The absurdity of the presumption is evidenced by the examples in medicine, the family, any sexual relations, *etc.*, set forth above, as well as numerous other common life experiences.

The incorporation by the challenged section of an 'irrebuttable presumption," which is, in fact, refutable and whose underlying principle is baseless and unwarranted, has been frequently prohibited as a violation of due process.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests. . . . It therefore cannot stand."[34]

The prohibition against the incorporation into statutes of unwarranted presumptions has been reaffirmed in prior, related cases dealing with sexual (gender) preferences,[35] illegitimacy

[34] *Stanley* v. *Illinois*, 405 U.S. 645, 656-657 (1972).

[35] *Reed* v. *Reed*, etc., 404 U.S. 71, 75-76 (1971); *Frontiero*, et vir v. *Richardson*, etc., et al., 411 U.S. 677, 688-689 (1973); and *Weinberger*, etc. v. *Wiesenfeld*, 420 U.S. 636, 642-643 (1975).

of children[36] and pregnancy.[37] When governmental action "rests on an irrebuttable presumption often contrary to fact . . . (i)t therefore lacks critical ingredients of due process."[38] It has been suggested that such presumptions may be a parameter and/or surrogate of equal protection, as well as of due process.[39]

The Missouri Court of Appeals, St. Louis District, erred in finding the challenged ordinance to be neither vague nor overbroad as applied to petitioners. That Court held that "[m]assage activities involving sexual touching would be prohibited by the ordinance."[40]

Clearly, that interpretation of the scope of the ordinance is correct. However, it must be emphasized that the ordinance does not limit itself to a prohibition of touching for sexual purposes. On the contrary, the ordinance prohibits "any touching, manual or otherwise."[41]

The record in this cause, such as it is, does not reveal that petitioners touch their clients for sexual purposes and yet that

[36] *Stanley*, *id.*, *supra*, at note 30; *Jimenez*, et al. v. *Weinberger*, etc., 417 U.S. 628, 631-634 (1974); *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973); and *New Jersey Welfare Rights Organization*, et al. v. *Cahill*, etc., et al., 411 U.S. 619, 620-621 (1973).

[37] *Cleveland Board of Education*, et al. v. *LaFleur*, et al., 414 U.S. 632, 643-648 (1974); and *Andrews*, et al. v. *The Drew Municipal Separate School District*, et al., 507 F.2d 611, 615-616 (5th Cir. 1975), *cert. denied*, 425 U.S. 559 (1976).

[38] *United States Department of Agriculture*, et al. v. *Murry*, et al., 413 U.S. 508, 514 (1973).

[39] Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); and Case Comment, *Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis*, 58 MINN. L. REV. 965 (1974).

[40] See the Court's Opinion in Appendix B.

[41] See subsection (c) of section 3 in Appendix A.

is the assumption upon which the Missouri Court of Appeals, St. Louis District, bases its opinion. The real overbreadth challenge to the ordinance at issue is not directed to its obviously impermissible applications to "the normal functions of obstetricians, gynecologists, urologists, proctologists, nurses and baby-sitters,"[42] but to its blatant overbreadth as applied to these petitioners.

The Missouri Court of Appeals, St. Louis District, in an effort to uphold the constitutionality of the challenged ordinance, chose to overlook the absence of any evidence or finding that petitioners fall within the ambit of its perhaps intended, although clearly not expressed, attempt to criminalize sexual massage. That Court did not give effect to the challenged ordinance as it was written, but rather acted as a superlegislature and added an additional element of sexuality to the ordinance, thereby rewriting it.

Clearly, petitioners have standing to raise a challenge to the overbreadth of the ordinance. As previously stated, vendors of services may raise the privacy, equal protection and other constitutional rights of third parties, outside the First Amendment context.[43]

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[42] See the Court's Opinion in Appendix B.

[43] *Singleton, supra; Craig, et al. v. Boren, etc., et al.*, 429 U.S. 190 (1976); and, *Carey, supra.*

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

Bill No. 178, 1975
Ordinance No. 7546, 1975
Introduced by Councilman Breihan

AN ORDINANCE
AMENDING TITLE VII, CHAPTER 713, SLCRO 1964, AS AMENDED, THE VICE AND MORALITY CODE, BY REPEALING THEREFROM SECTIONS 713.030, 713.040, 713.050 AND 713.080, AND ENACTING AND ADDING THERETO THREE NEW SECTIONS TO BE NUMBERED 713.030, 713.040 AND 713.080, RELATING TO THE REGULATION OF PROSTITUTION.

BE IT ORDAINED BY THE COUNTY COUNCIL OF ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:

SECTION 1. Sections 713.030, 713.040, 713.050 and 713.080 SLCRO 1964, as amended, are hereby repealed.

SECTION 2. Title VII, Chapter 713, SLCRO 1964, as amended, the Vice and Morality Code, is hereby amended by enacting and adding thereto three new sections, to be numbered 713.030, 713.040 and 713.080, relating to the regulation of prostitution, which new sections shall read as follows:

713.030 **Definitions** 1. The term "person" as used in this Chapter shall mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.

2. A person commits "prostitution" if he or she engages or offers or agrees to engage in sexual conduct in return for something of value to be received by the person or a third person.

3. "Sexual Conduct" occurs when there is:

(a) "Sexual Intercourse" which occurs when there is any penetration of the female sex organ by the male sex organ;

(b) "Deviate Sexual Intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person;

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another.

4. "Something of Value" means any money or property, or any token, object or article exchangeable for money or property.

5. "Promoting prostitution" occurs when a person knowingly promotes, solicits, compels, or encourages a person to engage in prostitution or patronize prostitution.

6. "Profiting from Prostitution" occurs when a person, acting other than as a prostitute receiving compensation for personally rendered prostitution services, knowingly accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.

713.040 **Prostitution, Promoting Prostitution, Profiting from Prostitution—Prohibited.**—A person shall not engage in prostitution, promoting prostitution, or profiting from prostitution.

713.080 **Penalties**—Any person violating any of the provisions of this Chapter shall upon conviction be punished by a fine not exceeding One Thousand Dollars ($1,000.00) or by imprisonment in the County Jail for not exceeding one (1) year, or both such fine and imprisonment.

APPENDIX B

In the Missouri Court of Appeals
St. Louis District
Division Two

CAESAR'S HEALTH CLUB, et al., Plaintiffs-Appellants, vs. ST. LOUIS COUNTY, MISSOURI, Defendant-Respondent.	No. 38558 Appeal from the Circuit Court St. Louis County Hon. George W. Cloyd, Judge OPINION FILED April 11, 1978

Respondent, the County of St. Louis, enacted an ordinance prohibiting prostitution. Appellants, twelve corporations or proprietorships, each a so-called "massage parlor" operating in St. Louis County, filed a petition to enjoin enforcement of the ordinance and to have it declared unconstitutional. The Circuit Court of St. Louis County declared it "to be constitutional; lawful and valid", denied a permanent injunction, but stayed its enforcement pending the outcome of this appeal. The ordinance, No. 7546, which was to become effective on August 20, 1975, provides:

"SECTION 2. Title VII, Chapter 713, SLCRO 1964, as amended, the Vice and Morality Code, is hereby amended by enacting and adding thereto three new sections, to be numbered 713.030, 713.040 and 713.080, relating to the regulation of prostitution, which new sections shall read as follows:

713.030 **Definitions** 1. The term "person" as used in this Chapter shall mean any natural person, firm, part-

nership, co-partnership, association, corporation or organization of any kind.

2. A person commits "prostitution" if he or she engages or offers or agrees to engage in sexual conduct in return for something of value to be received by the person or a third person.

3. "Sexual Conduct" occurs when there is:

(a) "Sexual Intercourse" which occurs when there is any penetration of the female sex organ by the male sex organ;

(b) "Deviate Sexual Intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person;

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another.

4. "Something of Value" means any money or property, or any token, object or article exchangeable for money or property.

5. "Promoting prostitution" occurs when a person knowingly promotes, solicits, compels, or encourages a person to engage in prostitution or patronize prostitution.

6. "Profiting from Prostitution" occurs when a person acting other than as a prostitute receiving compensation for personally rendered prostitution services, knowingly accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.

713.040 **Prostitution, Promoting Prostitution, Profiting from Prostitution—Prohibited.**—A person shall not engage in prostitution, promoting prostitution, or profiting from prostitution.

713.080 **Penalties**—Any person violating any of the provisions of this Chapter shall upon conviction be punished by a fine not exceeding One Thousand Dollars ($1,000.00) or by imprisonment in the County Jail for not exceeding one (1) year, or by both such fine and imprisonment."

In their petition, appellants admit they "engage in the practice of giving massages at the request of the client, which do result in consensual touching of a person's anus or genitals", and which conduct specifically would be prohibited under §3(c) of the ordinance. Massage activities involving sexual touching would be prohibited by the ordinance, and violation of the ordinance could result in civil prosecution of appellants and their employees. Because this case requires application of established constitutional principles and involves no real issue requiring construction of the United States and Missouri Constitutions, we have jurisdiction. Art. V, §3, Mo. Const. 1945, as amended, 1970. St. Louis County Transit Co. v. Division of Employment Security, 456 S.W.2d 334 (Mo. 1970); Forbis v. Associated Wholesale Grocers, Inc., 513 S.W.2d 760 (Mo. App. 1974).

Appellants argue the trial court erred in declaring the ordinance constitutional because respondent failed to meet its burden of demonstrating a compelling state interest as justification for the ordinance.[1] Appellants correctly cite Roe v. Wade, 410

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[1] Appellants argue in their brief that the trial court ruled prematurely and thereby precluded presentation of evidence of a "compelling state interest". Because the compelling state interest test is here inapplicable, evidence of this nature was not required.

A reading of the record makes it clear the parties submitted the case to the court on the pleadings and memoranda.

U.S. 113 (1973), for the proposition that "[w]here certain 'fundamental rights' are involved, . . . [a] regulation limiting these rights may be justified only by a 'compelling state interest', . . ." *Id.* at 155. Before we invoke this rule, however, it must appear that the challenged statute or ordinance infringes some fundamental right; and while the right of privacy has been recognized as just such a fundamental right, we are not convinced in this case that appellant has asserted a protectable privacy interest. The "compelling state interest" test is therefore inapplicable here.

Rather, we must judge the validity of the challenged ordinance according to the standard applicable to the exercise of police power, and the test of the validity of an exercise of police power is reasonableness. McDonnell Aircraft Corporation v. City of Berkeley, 367 S.W.2d 498 (Mo. 1963). In general, the test of reasonableness is met in any case in which the object of the police measure is a proper one, as we conclude here, and the means adopted to accomplish that object are appropriate. *See* Lawton v. Steele, 152 U.S. 133 (1894), as cited in Goldblatt v. Hempstead, 369 U.S. 590, 594-95 (1962).

The exercise of police power is presumed to be constitutionally valid; the presumption of reasonableness is with the State. Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Salsburg v. Maryland, 346 U.S. 545 (1954). The exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it. U.S. v. Caroline Products Co., 304 U.S. 144 (1938). The party challenging certain legislation has the burden on the question of its reasonableness. Goldblatt v. Hempstead, *supra.*

The general law in Missouri was stated recently in Flower Valley Shopping Center v. St. Louis County, 528 S.W.2d 749, 753-54 (Mo. banc 1975), *citing* Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 981, 13 S.W.2d 628, 634 (1929):

> "It has been definitely and clearly established and settled, by the decisions of this court and of the federal Supreme Court, that a statute or a municipal ordinance which is fairly referable to the police power of the state or municipality, and which discloses upon its face, or which may be shown aliunde, to have been enacted for the protection, and in furtherance, of the peace, comfort, safety, health, morality, and general welfare of the inhabitants of the state or municipality, does not contravene or infringe the several sections of the state and federal Constitutions invoked by the appellants herein, and cannot be held invalid as wrongfully depriving the appellants of any right or privilege guaranteed by the Constitution, state or federal; the reason and basis underlying such decisions being that the personal and property rights of the individual are subservient and subordinate to the general welfare of society, and of the community at large, and that a statute or ordinance which is fairly referable to the police power has for its object the 'greatest good of the greatest number.' "

An ordinance prohibiting prostitution is clearly referable to the police power of local government. We believe the ordinance here in question discloses on its face a purpose to protect and further the health, morality and general welfare of the citizenry, and that it furthers its purpose in a reasonable way. We now consider appellants' specific constitutional arguments.

They assert that enforcement of the ordinance would infringe upon the constitutionally guaranteed right of privacy insofar as it would proscribe private sexual conduct between consenting adults. Clearly, no privacy interests of the individual corporations and proprietorships is being asserted here. Rather, it is the right of its employees and customers to engage in certain sexual activities which appellants seek to have protected. Relief is requested not on the basis of some unconstitutionally incurred loss or injury appellants themselves might suffer, but rather on

the basis of perceived rights of third persons who are not party to this litigation. Assuming in this instance that appellants have vicarious standing[2] to assert the rights of its masseuses and customers, we nevertheless find no merit in appellants' claim.

The Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. ". . . [The] decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty, '. . . are included in this guarantee of personal privacy." Roe v. Wade, *supra* at 152. "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-66 (1973) (citations omitted). Appellants urge that implicit in the concept of ordered liberty is the fundamental privacy right of its employees and patrons to participate in sexual massage activities in the seclusion afforded by appellants' massage establishments. For support, they look principally to Griswold v. Connecticut, 381 U.S. 479 (1965) and Stanley v. Georgia, 394 U.S. 557 (1969). Reliance on these cases is unavailing, however. *Griswold* and *Stanley,* and other decisions cited by appellants,[3] in no way intimate that there exists an absolute and unqualified right of privacy, sexual or otherwise. The conclusion which can more readily be drawn from the cases is that the right to privacy is not without limit as to places and relationships. United States v. McKean, 338 A.2d 439 (D.C. App. 1975).

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[2] The problem of standing, as it has arisen principally in the federal courts, ordinarily requires consideration of two distinct questions: first, whether the litigant can demonstrate "a sufficiently concrete interest" in the outcome of the litigation and to render the suit a "case or controversy"; and second, as a prudential matter, whether the litigant is a proper proponent of the particular legal rights on which he bases his suit. Singleton v. Wulff, 96 S.Ct. 2868, 2873 (1976).

[3] In particular, Roe v. Wade, 410 U.S. 113 (1973) and Eisenstadt v. Baird, 405 U.S. 438 (1972).

It is to be noted that the challenged ordinance does not prohibit persons from engaging in acts of massage as such, but from engaging in acts of massage involving sexual touching, for hire. And whatever may be said of the potential right of consenting adults to engage in private sexual massage activities, that, strictly speaking, is not the issue before us. Rather, it is the commercialization of such activities with which we are concerned, and it is this commercial aspect which we believe removes them from the sphere of a protectable right of privacy. *See* Brown v. Haner, 410 F.Supp. 399, 401 (W.D. Va. 1976).

Implicit in appellants' argument is the suggestion that their establishments constitute private places, analogous to the private home in Stanley v. Georgia, *supra,* or the marital bedroom in Griswold v. Connecticut, *supra.* In Paris Adult Theatre I v. Slaton, *supra,* however, the Supreme Court rejected arguments that a place of public accommodation, a theater, was protected by the cloak of privacy. We reach the same conclusion in respect to the essentially commercial establishments here. The activities proscribed by the ordinance are carried on in places "which cannot in contemplation of law reasonably be considered private." United States v. McKean, *supra* at 440. *See also* Harris v. United States, 315 A.2d 569 (D.C.App. 1974). Such activities therefore are not entitled to protection by a constitutional right of privacy.

Appellants further contend the ordinance is unconstitutionally overbroad, and therefore void and unenforceable. The ordinance states that "[a] person commits 'prostitution' if he or she engages or offers or agrees to engage in sexual conduct in return for something of value. . . ." "Sexual conduct" is defined as " 'sexual contact' which means any touching, manual or otherwise, of the anus or genitals of one person by another." The ordinance contains no provision as to whom or what it applies and makes no specific reference to massage establishments. While admitting that the conduct on their

premises falls within the proscriptions of the ordinance, appellants maintain that by defining "sexual conduct" as *any* touching of the anus or genitals of one person by another, the ordinance may be construed to proscribe the normal functions of obstetricians, gynecologists, urologists, proctologists, nurses and baby sitters, all of whom are compensated for services which frequently require touching of the anal and/or genital areas.

Assuming the ordinance might be applied in ways suggested by appellants, we do not believe they may be heard to challenge the ordinance on grounds of overbreadth. The general rule is that "[O]ne to whom application of a statute is constitutional will *not* be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). Employment of the overbreadth doctrine was restricted by the United States Supreme Court in Broadrick v. Oklahoma, 413 U.S. 601 (1973); it is used "sparingly and only as a last resort." *Id.* at 613. Our Supreme Court, in Chamberlin v. Missouri Elections Com'n, 540 S.W.2d 876, 881 (Mo. banc 1976), has recognized a narrowing of the doctrine. Thus in only limited situations will courts now permit a litigant to assert, by way of the overbreadth doctrine, argued rights of non-litigants to whom a statute might be applied. The one principal exception to the general rule obtains in the first amendment area, where a statute which arguably violates rights of free speech or expression of others may be challenged by one to whom it may be constitutionally applied. Broadrick v. Oklahoma, *supra*, at 611; United States v. Brewer, 363 F. Supp. 606, 609 (M.D. Pa. 1973).

This case presents no issues touching on the first amendment; the ordinance clearly poses no threat to the rights of free speech and expression of doctors, nurses, baby sitters, or

others whose conduct might be said to fall within the literal scope of the ordinance. Indeed, it is upon a theory of privacy that appellants base their claim. Where, as here, certain protected conduct, and not speech, is encompassed by an otherwise valid proscriptive statute, the overbreadth doctrine is rarely applicable. As stated in Broadrick v. Oklahoma, *supra* at 615:

> "[F]acial overbreadth adjudication is an exception to our traditional rules of practice and . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. . . .
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> * * * * * * *
>
> [W]here conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statut's plainly legitimate sweep."

It is our view that the alleged overbreadth of the ordinance is neither real nor substantial. Moreover, because possible invalid applications of the ordinance are highly speculative and not presently before this court, we believe the ordinance should stand "until an actual case corroborates and justifies [appellants] claim of anticipated harm and unconstitutional application." Chamberlin v. Missouri Elections Com'n, *supra*.

That such a case will ever arise seems inconceivable. We cannot bring ourselves to believe that the rights of doctors, nurses, etc., will be, or were even intended to be, affected by the ordinance. In judging the validity of the ordinance, we must be guided by "robust common sense." Common sense

suggests that while the definitional terms of the ordinance may encompass certain activities, as suggested by appellants, the ordinance cannot reasonably be construed to prohibit such activities. The ordinance should not be declared overbroad on the basis of frivolous and speculative invalid applications when a limiting construction can reasonably be placed on it.

The judgment of the trial court is hereby affirmed.

/s/ JAMES R. REINHARD, Judge

Joseph G. Stewart, Presiding Judge, Concurs

Robert G. Dowd, Judge, Concurs

APPENDIX C

No. 60809

In the Supreme Court of Missouri
St. Louis District No. 38558

May Session 1978

Ceasar's Health Club, et al., Appellants,

vs. TRANSFER

St. Louis County, Missouri, Respondent.

Now at this day, on consideration of appellants' Application to transfer the above entitled cause from the St. Louis District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1978, and on the 15th day of June 1978, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of June, 1978.

/s/ THOMAS F. SIMON, Clerk
/s/ By JANICE B. HANSON, D.C.